

RUSSELL AVERY AND DOUGLAS E. NOLAND

IBLA 86-851

Decided August 25, 1987

Appeal from a decision of the Nevada State Office, Bureau of Land Management, declaring mining claims N MC 297635 and N MC 297643 null and void ab initio.

Affirmed.

1. Act of August 27, 1958 -- Mining Claims: Lands Subject To -- Rights-of-Way: Federal Highway Act

Mining claims located on lands subject to a valid, on-going, and pre-existing material site right-of-way granted to the State of Nevada pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1982), are null and void ab initio.

APPEARANCES: Rhonda L. Cavin, Esq., Las Vegas, Nevada, for appellants.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Russell Avery and Douglas E. Noland have appealed from a decision of the Nevada State Office, Bureau of Land Management (BLM), dated February 20, 1986, declaring the Gem #1 and Gem #9 placer mining claims (N MC 297635 and N MC 297643) null and void ab initio. The claims are situated in the SW 1/4 SW 1/4 sec. 29, and the SE 1/4 SE 1/4 sec. 30, T. 28 S., R. 63 E., Mount Diablo Meridian, Clark County, Nevada. They were located December 20 and 21, 1983, and recorded with BLM on February 9, 1984.

BLM declared the claims null and void ab initio stating:

Records of the Nevada State Office, Bureau of Land Management, show that these lands are held by the State of Nevada under Highway Material Site Right-of-Way NEV-59097 (December 21, 1962). Lands which are appropriated and transferred to a State highway department as a material site are not open to mineral entry or location.

The record includes the State right-of-way file, which contains a copy of a December 21, 1962, BLM decision granting material site right-of-way (Nev-059097) to the State of Nevada Department of Transportation as a source of material for use on Federal Aid Highways. The right-of-way was granted pursuant to section 317 of the Act of August 27, 1950, 23 U.S.C. § 317 (1982), and encompasses the SW 1/4 SW 1/4, sec. 29; the SE 1/4 SE 1/4, sec. 30; and the NW 1/4 NW 1/4, sec. 32, T. 28 S., R. 63 E., Mount Diablo Meridian, Nevada.

Appellants assert on appeal that before locating the claims "we personally checked with the local BLM in Las Vegas and found this area to be open for the location of mining claims." They contend they have expended time and effort to develop water rights and have been negotiating with the State of Nevada Department of Transportation for the use of the material site.

[1] It is well established that material site rights-of-way created under the Federal Aid Highway Act, August 27, 1950, 23 U.S.C. § 317 (1982), effectively withdraw the lands affected from entry and location under the mining law. Ralph Memmott, 61 IBLA 116 (1982); James F. Pepcorn, 50 IBLA 414 (1980); Sam D. Rawson, 61 I.D. 255 (1953). Accordingly, BLM properly declared the claims null and void.

Appellants indicate that the claims in question are crucial to their mining operation, and that they are in contact with the State and working towards the mutual use of the site. However, no rights in these claims could be obtained through any grant or recognition by the Department of Transportation, as the lands are unavailable for entry under the Federal mining law. It also appears that the State has a continued need for materials from the site. In a March 14, 1986, letter to appellant Noland, the State's supervisor for right-of-way engineering states:

In response to your letter of March 4, 1986, the Department has made a review of the needs for the above referenced material site with the following conclusions. The State of Nevada has an on going construction project south of Searchlight, Nevada which is presently utilizing our material site. We have on our project schedule at least two more projects in the near future. The uncertainty of federal monies makes it impossible to say when the Nevada Department of Transportation's need for this site would end.

Although we are sympathetic with your plight, there is nothing we can do for you in the near future.

Although appellants maintain they checked with BLM before locating the claims and found the area to be open to mineral entry we note that the master title plat, and serial register pages for T. 28 S., R. 63 E., reflect that the lands at issue in secs. 29, 30, and 32 were subject to Nev-59097 material site. Thus, appellants were placed on notice that these lands were not open to entry.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Gail M. Frazier  
Administrative Judge

We concur:

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Wm. Philip Horton  
Chief Administrative Judge

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R. W. Mullen  
Administrative Judge